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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1984

No. 84 - 203

KENNETH W. BEHREND and
BEHREND, ARONSON and MORROW

Petitioners,

v.

ALTON GODWIN et al.,

Respondents.

ON PETITION FOR WRIT OF
CERTIORARI TO THE UNITED
STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT COURT

REPLY MEMORANDUM OF PETITIONERS

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Counsel for
Petitioners

October 2, 1984

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NO. 84-203

KENNETH W. BEHREND and
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v.

ALTON GODWIN and KAREN GODWIN,
and VICTOR SCHRAMM, UNITED
STATES OF AMERICA.

Respondents.

ON PETITION FOR WRIT OF
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REPLY MEMORANDUM OF PETITIONERS

In the instant proceedings the Respondent, United States of America, has submitted a Memorandum in Opposition to the Petition for Writ of Certiorari to the

United States Court of Appeals for the Third Circuit. The said memorandum has improperly characterized the Petitioners' prayer for relief as a request for review of the Court of Appeals application of an equitable estoppel to foreclose Petitioners' claim for a fee from the undefined and uncalculated amount of the future benefit aspect of a structured settlement. Respondent has neither addressed nor offered precise counter authority to the crucial issue which the petition, in fact, raised, to wit: that the courts below committed fundamental reversible error by assuming jurisdiction under the Federal Tort Claims Act, over an element of damages which had not been mandated by the Congress as a province of the federal courts under 28 U.S.C. Sec. 1346, Sec. 1346(b), Sec. 2671 et seq. and

Sec. 2679(b). Unanswered by the respondent is the force of Frankel v. Heyin et al. 466 F.2nd 1226 (3rd Cir. 1982) which sustained the District Court's rejection of a United States' demand for a judgment which included a provision for indefinite future payments and interim progress payments of attorney fees as the trust funds were paid out to the plaintiff.

Respondent here has offered no authority nor addressed any argument to petitioners' premise that under Frankel, the United States Attorney lacked the executive capacity to contract a settlement under Sec. 2672 of the Federal Tort Claims Act (28 U.S.C.A. Sec. 2672) which was not stated in "money damages." Nor has the respondent come forth with an answer to Judge Hastie's teaching under

Frankel that a district court in administering the Federal Tort Claims act should not make other than lump sum money judgments unless and until Congress shall authorize a different type of award. (Emphasis supplied. See Frankel supra pp. 1228-1229). Respondent's opposition memorandum reasserts the estoppel and waiver considerations upon which the Circuit Court grounded its affimation of the District Court's denial of petitioners claims for asserted attorney fees and suit preparation expenses. Your petitioner respectfully submits that inasmuch as the U.S. attorney respondent and the Courts below under Frankel had no power to act on the future benefit element of the consented judgment it was in legal effect a nullity, which could not be cured by agreement of the respondents over the

persistent objection of petitioner. The future benefit package continues vague and uncertain in not positively circumscribing respondents' Godwins monetary entitlement and in its present form is questionably vulnerable to collateral attack by either of the respondents.

In answer to respondent's contention that petitioner had waived any right to the claim for litigation preparation expenses, petitioner asserts that the oblique procedure ordered by the district court deprived him of the fundamental fairness to which a claimant or possible litigant is entitled. In this respect, the petitioner asserts that the district court committed fundamental error in not only failing to conduct an evidentary hearing on the issue of feeentitlement

(when the fact of attorney fees surfaced as an issue) but also erred when it truncated petitioner's claim for record costs and trial preparation expenses by way of a colloquial courtroom meeting of the parties involving neither a pleading framework nor the taking of any testimony. The order of the district court directing petitioner to present his claim for costs within 30 days and denying the same without a hearing, deprived petitioner of the congressionally mandated procedure for the assertion of record costs and likewise his substantial contract claim under the Federal Rules of Civil Procedure.

In the face of this procedure petitioner was precluded from asserting a claim for the quantum meruit value of trial preparation expense pursuant to this court's doctrine in Woods v. City Bank

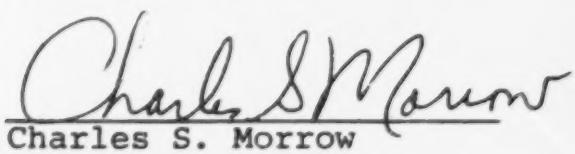
Co. 312 U.S. 262, 61 S.Ct. 493, 85 L.Ed. 820 (1941). Petitioner submits that the further action of the district court in asserting DR 2-106(a) of the Model Code of Professional Responsibility (which was established as a guideline for deciding the reasonableness of contingent fees) as authorityfor extinguishing a contract claim on the basis of exacting a penalty is clearly erroneous and subject to this Honorable Court's supervision apart from any consideration argued above. The district court neither noticed petitioner in advance that the said rule was controlling in the suit expenses claim nor did it demonstrably follow the eight step procedure set forth in the rule which could not be implemented without an evidentiary hearing (see DR 2-106(b), 42 Pa.C.S.A).. The inapplicability of the

said Rule in the instant premises was acutely accented in the recent action of the Disciplinary Board of the Supreme Court of Pennsylvania of September 14, 1984, wherein it formally dismissed a complaint against individual petitioner, Kenneth W. Behrend, which had arisen from the district court's assertion of the said Rule herein. (See Petitioners Appendix B1 and B2).

Your petitioner respectfully submits that the district courts superimposition of DR 2-106(a) upon a 28 U.S.C.A. 2678 situation works a direct conflict of a Judge-made State Supreme Court Rule with, and the probable rescission of an act of the national Congress, warranting plenary supervisory review by your Honorable Court.

Petitioners renew their prayer that the writ of certiorari issue so, that this Honorable Court may review the action of the courts below and direct appropriate remedial action.

Respectfully submitted,



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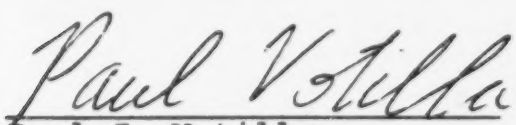

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October 1984

APPENDIX

Samuel C. Stretton
Attorney at Law
305 North High Street
West Chester, PA 19380

September 21, 1984

Kenneth Behrend, Esquire
1320 Grant Building
Pittsburgh, PA 15219

Dear Ken:

I have enclosed a copy of the September 14, 1984 letter of Burkhardt indicating your case was dismissed formally. This was the case involving the matters with Judge Ziegler.

I hope all is well with you and I hope that we are still friends and if you are ever in the area, you will stop by or give me a call.

Very truly yours,
(signed)
Samuel C. Stretton

SCS:dam
enc.

COPY

APPENDIX B1

OFFICE OF DISCIPLINARY COUNSEL
The Disciplinary Board of the
Supreme Court of Pennsylvania
DISTRICT IV OFFICE
3718 Mellon Bank Building
525 William Penn Place
Pittsburgh, Pennsylvania 15219

September 14, 1984

Samuel C. Stretton, Esquire
305 North High Street
West Chester, PA 19380

Re: Kenneth W. Behrend, Esquire
File Reference #C4-84-650

Dear Mr. Stretton:

This is to advise you that a complaint concerning Mr. Behrend which was opened on motion of the Office of Disciplinary Counsel has now been dismissed.

Be assured that I appreciated receiving from you the brief you sent with your letter of May 19, 1983.

We have had no contact with Mr. Behrend. I note that he was a courtesy addressee of your letter, and might be interested to know of this disposition. Best personal regards.

Sincerely,
(signed)
Edward A. Burkardt
Assistant Disciplinary Counsel

EAB/lm

COPY

APPENDIX B2

CERTIFICATE OF SERVICE

I certify that I have this 2nd day of October, 1984 served three copies of the within Petition for Writ of Certiorari by first class mail, postage pre-paid upon each of the following: ROBERT A. ZUNICH, Zimmer and Dice, 584 Allegheny Avenue, Oakmont, PA 15139, PAUL J. BRYSH, Assistant U.S. Attorney, U.S. Attorney's Office, 633 U.S. P.O. and Courthouse, Pittsburgh, PA 15219 and NEIL L. CONWAY, Harrigan, Kluger, Spohrer & Quinn, 700 United Penn Bank Building, Wilkes-Barre, PA 18701. I have also made service upon the Solicitor General, Department of Justice, Washington, D.C. 20530, by serving three (3) copies of this foregoing Petition for Writ of Certiorari by first class mail, postage pre-paid. I further

certify that all parties required to be served have been served.

BY Charles S Morrow

Charles S. Morrow
1320 Grant Building
Pittsburgh, PA 15219

Paul Votilla

Paul J. Votilla
1326 Grant Building
Pittsburgh, PA 15219